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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEB - 6 2008

In the Matter of)

Leased Commercial Access)

MB Docket No. 07-42)

FCC MAIL ROOM

**REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: November 27, 2007

Released: February 1, 2008

Comment Date: 30 days after date of publication in the Federal Register

Reply Comment Date: 45 days after date of publication in the Federal Register

By the Commission: Chairman Martin and Commissioner Adelstein issuing separate statements;
Commissioner Copps approving in part, concurring in part, and issuing a separate statement; Commissioners Tate and McDowell dissenting and issuing separate statements.

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I. INTRODUCTION

1. On June 15, 2007, the Commission released a Notice of Proposed Rulemaking (“NPRM”) in this proceeding, seeking comment on its commercial leased access (“leased access”)¹ and program carriage² complaint procedures.³ The Commission also sought comment on the implementation of arbitration procedures for resolving leased access and program carriage disputes.⁴

2. In this Report and Order, we modify the Commission’s leased access rules. With respect to leased access, we modify the leased access rate formula; adopt customer service obligations that require minimal standards and equal treatment of leased access programmers with other programmers; eliminate the requirement for an independent accountant to review leased access rates; and require annual reporting of leased access statistics. We also adopt expedited time frames for resolution of complaints and improve the discovery process. Finally, we seek comment in a Further Notice of Proposed Rulemaking on whether we should apply our new rate methodology to programmers that predominantly transmit sales presentations or program length commercials.

¹ 47 C.F.R. §§ 76.970 through 76.977.

² 47 C.F.R. §§ 76.1300 through 76.1302.

³ *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rule Making, MB Docket No. 07-42, 22 FCC Rcd 11222 (rel. Jun. 15, 2007) (“NPRM”). A summary of the NPRM was published in the Federal Register on July 18, 2007. See 72 FR 39370 (Jul. 18, 2007). Comment and reply comment deadlines were extended to September 11, 2007 and October 12, 2007, respectively. See *Order Granting Extension of Time for Filing Comments and Reply Comments*, DA 07-3736 (rel. Aug. 24, 2007).

⁴ The Commission will address program carriage issues in a separate order. In the NPRM, the Commission consolidated issues concerning the Commission’s programming diversity rules that were raised in the context of the *Adelphia Order*, the 2005 Video Competition proceeding, informal complaints from the Leased Access Programmers’ Association and The America Channel, and through the Commission’s formal complaint process. See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., et al.*, Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”) and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, MB Docket No. 05-255, 21 FCC Rcd 2503, 2507 ¶ 12, 2512-2515 ¶¶ 31-36 (2006) (“*Twelfth Annual Report*”). Approximately 70 leased access petitions have been filed since our 1997 rule changes. The majority of leased access complaints allege that the cable company has refused to provide rate information or is charging excessive rates and has refused to carry programming. Other issues concern insurance requirements and technical support. Most recently, the Commission discussed establishing an expedited process for program carriage complaints in lieu of the program carriage arbitration condition contained in the *Adelphia Order*. See *Comcast Corporation, Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, File No. CSR-7108, FCC 07-172 (rel. Sept. 25, 2007) (“*TAC Order*”); see also *Adelphia Order*, 21 FCC Rcd 8203, 8287 at ¶ 190.

II. COMMERCIAL LEASED ACCESS RULES

A. Background

3. The commercial leased access requirements are set forth in Section 612 of the Communications Act of 1934, as amended ("Communications Act").⁵ The statute and corresponding leased access rules require a cable operator to set aside channel capacity for commercial use by unaffiliated video programmers. The statutory framework for commercial leased access was first established by the Cable Communications Policy Act of 1984.⁶

4. Congress established leased access set-aside requirements in proportion to a system's total activated channel capacity. Cable operators with fewer than 36 channels must set aside channels for commercial use only if required to do so by a franchise agreement in effect as of the enactment of Section 612. Operators with 36 to 54 activated channels must set aside 10 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Operators with 55 to 100 activated channels must set aside 15 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use. Cable operators are not required to remove services that were being provided on July 1, 1984, in order to comply with the statute.⁷

5. In the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress broadened Section 612's explicit statutory purpose to include the promotion of "competition in the delivery of diverse sources of video programming," in addition to its original aim of bringing about "the widest possible diversity of information sources" for cable subscribers, and required the Commission: (a) to "determine the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use;" (b) to "establish reasonable terms and conditions for such use, including those for billing and collection;" and (c) to "establish procedures for the expedited resolution of disputes concerning rates or carriage . . ."⁸ Congress also required that the Commission's rules not adversely affect the operation, financial condition, or market development of the cable system.⁹

6. In implementing the statutory directive to determine maximum reasonable rates for leased access, the Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the "average implicit fee" that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit.¹⁰ The Commission also adopted a maximum rate for a la carte services based on the "highest implicit fee" that other a la carte services implicitly pay, and a

⁵ The Commission adopted leased access rules in its *Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5631 (1993) ("Rate Order"); *Order on Reconsideration of the First Report and Order and Further Notice of Rulemaking*, 11 FCC Rcd 16933 (1996) ("Reconsideration Order"); and *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267 (1997) ("Second Report and Order").

⁶ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq.*

⁷ Communications Act §§ 612(a), 612(b)(1) (codified at 47 U.S.C. §§ 532(a), 532(b)(1)).

⁸ Communications Act § 612(c)(4)(A)(i), (ii), (iii) (codified at 47 U.S.C. §§ 532(c)(4)(A)(i), (ii), (iii)).

⁹ 47 U.S.C. § 532(c)(1).

¹⁰ *Second Report and Order*, 12 FCC Rcd 5267, 5283 (1997).

prorated rate for part-time programming.¹¹

7. Cable operators may use any unused channel capacity designated for leased access until an unaffiliated programmer obtains use of the channel capacity pursuant to a written agreement.¹² Cable operators may use up to 33 percent of the channel capacity designated for leased access for qualified minority or educational programming sources, whether or not the source is affiliated with the cable operator.¹³ In addition, cable operators may impose reasonable insurance requirements and must provide the minimal level of technical support necessary for users to present their material on cable systems.¹⁴ Cable operators may not unreasonably refuse to cooperate with a leased access user in order to prevent that user from obtaining channel capacity.¹⁵

B. Scope of the NPRM

8. In the NPRM, the Commission sought comment on the current status of leased access programming, such as whether, which and what type of programmers are using leased access channels; the number of full and part-time leased access channels that cable operators provide and are used; how often cable operators turn down requests for leased access and why; to what extent and for what purposes do cable operators use the channels and does this use contribute to programmers' lack of use; and whether the terms in leased access agreements, such as insurance or termination provisions, are the same or similar to those terms that the cable operator has with its own affiliated or non-affiliated programmers. The Commission also sought comment on the effectiveness of leased access enforcement; the costs and burdens associated with the complaint or other dispute resolution processes, time frames for the process; whether the process is being fully utilized and whether cable operators are complying with existing requirements and time frames.¹⁶

9. The Commission sought comment on the rate formula for leased access channels; whether the development of digital signal processing and signal compression technologies require changes in the formula;¹⁷ whether changes in technology require flexibility in the delivery format; whether the rules

¹¹ See 47 C.F.R. §§ 76.970 - 76.977. Section 612 is codified at 47 U.S.C. § 532. The Commission's rate rules were upheld by the D.C. Circuit Court of Appeals. See *ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

¹² 47 U.S.C. § 532(b)(4).

¹³ 47 C.F.R. § 76.977.

¹⁴ 47 C.F.R. § 76.971(d); 47 C.F.R. § 76.971(c).

¹⁵ 47 C.F.R. § 76.971(c).

¹⁶ *NPRM*, 22 FCC Rcd 11222, ¶¶ 7-11.

¹⁷ In calculating a system's capacity for purposes of 47 U.S.C. § 532 (b), "activated channels" includes all commercial and noncommercial broadcast, public, educational, governmental, and leased access channels carried. See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations, and Anti-trafficking Provisions*, 8 FCC Rcd 8565, 8588-89 ¶ 54 (1993). The Commission has also defined the term "activated channel" in the digital must carry context. See *Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999, Local Broadcast Signal Carriage Issues, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, 16 FCC Rcd 2598, 2614-16 ¶¶ 39-41 (2001); *Second Report and Order and First Order on Reconsideration*, 20 FCC Rcd 4516 (2005). Channel capacity can be calculated by taking the total usable activated channel capacity of the system in megahertz and dividing it by three. One third of this capacity is the limit on the amount of system spectrum that a cable operator must make available for commercial broadcast signal carriage purposes.

should allow more flexibility in tier and channel location; whether leased access should apply to video-on-demand ("VOD") or other technologies; and whether any advances in technology or marketplace developments affect the leased access rules, such as interactive electronic programming guides and addressable digital set-top boxes.¹⁸

C. Discussion

i. Customer Service Standards and Equitable Contract Terms

10. *Background.* In this Order, we adopt uniform customer service standards to address the treatment of leased access programmers and potential leased access programmers by cable system operators. In response to the NPRM, we received numerous comments outlining poor customer service practices and the imposition of unreasonable rates, terms and conditions for leased access by cable system operators. The record shows that poor customer service standards are impeding independent programmers' efforts to lease cable channels on unaffiliated cable systems by dissuading them from pursuing their statutory right to designated commercial leased access channels.¹⁹ For example, Pope Broadcasting Company ("PBC") claims that it has experienced "unethical, illegal and discriminatory practices by a number of cable providers."²⁰ CaribeVision Holdings, LLC ("CaribeVH") argues for more specific guidelines in the Commission's Rules, other than just references in the rules to "reasonable" and "expeditious" treatment.²¹ CaribeVH complains of poor responses to requests for leased access channel information, both in response time and in substance. MAP argues that cable systems refuse to include in electronic program guides the necessary information about leased access channels that would enable viewers to find programming that may be of interest to them.²² Engle Broadcasting ("Engle") complains that cable operators typically ignore its requests for information regarding rates and available time slots or flat out refuse to give rates claiming there was "no time available."²³

11. In response, cable operators contend that they respond to requests for leased access in a timely manner and that the rates, terms, and conditions that they offer for leased access are reasonable. NCTA states that leased access generally proceeds smoothly on the local level, with few complaints arising, because cable operators have an obligation to reasonably accommodate leased access users and devote a significant amount of time and energy to that purpose.²⁴ Time Warner Cable, Inc. ("TWC") argues that the current rules require cable operators to treat leased access programmers the same as other commercial programmers and that reasonableness standard is often decided through comparison with the treatment of non-leased access programmers.²⁵ Comcast contends that cable operators are responsive to

¹⁸ NPRM, 22 FCC Rcd 11222, ¶¶ 7-11.

¹⁹ Community Broadcasters Association, *et al. ex parte* letter dated November 16, 2007; CaribeVH Comments at 2, *et seq.*; Engle Comments at 3; iNFO Comments at 1, *et seq.*; LAPA Comments at 3, *et seq.*; MAP Comments at 2; PMI Comments at 2; PBC Comments at 1; RMI Comments at 3; Shop NBC Comments at 6.

²⁰ See PBC Comments at 1.

²¹ See CaribeVH Comments at 2.

²² See MAP Comments at 11-12.

²³ See Engle Comments at 4.

²⁴ See NCTA Comments at 8-9.

²⁵ See TWC Comments at 10; *see, e.g., United Multimedia Productions, Inc. and Hamptons Video Guide, Inc. v. CSC Acquisition-New York, Inc.*, Memorandum Order and Opinion, 16 FCC Rcd 5234, ¶ 9 (CSB 2001); *Second Report and Order*, 12 FCC Rcd 5267, ¶¶ 112-115.

requests for leased access information.²⁶

12. *Discussion.* As stated above, in order to make the leased access carriage process more efficient, we adopt new customer service standards, in addition to the existing standards. These standards are designed to ensure that leased access programmers are not discouraged from pursuing their statutory right to the designated commercial leased access channels, to facilitate communication of these rights and obligations to potential programmers, and to ensure a smooth process for gaining information about a cable system's available channels. As explained in more detail below, we require cable system operators to maintain a contact name, telephone number and e-mail address on its website, and make available by telephone, a designated person to respond to requests for information about leased access channels.²⁷ We also require cable system operators to maintain a brief explanation of the leased access statute and regulations on its website.²⁸ Within three business days of a request for information, a cable system operator shall provide the prospective leased access programmers with the following information: (1) The process for requesting leased access channels;²⁹ (2) The geographic levels of service that are technically possible;³⁰ (3) The number and location and time periods available for each leased access channel;³¹ (4) Whether the leased access channel is currently being occupied;³² (5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates;³³ (6) A comprehensive schedule showing how those rates were calculated;³⁴ (7) Rates associated with technical and studio costs;³⁵ (8) Electronic programming guide information;³⁶ (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;³⁷ (10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability;³⁸ and (11) Information regarding prospective launch dates for the leased access programming.³⁹ We explain each of these standards in further detail below. In addition to the customer service standards, we adopt penalties for ensuring compliance with these standards.⁴⁰ We emphasize that the leased access customer service standards adopted herein are "minimum" standards. We cannot anticipate each and every instance of interaction between cable operators and leased access programmers.

²⁶ See Comcast Reply Comments at 9.

²⁷ See Appendix B (adopting 47 C.F.R. § 76.972(a)(1)).

²⁸ See Appendix B (adopting 47 C.F.R. § 76.972(a)(2)).

²⁹ See Appendix B (adopting 47 C.F.R. § 76.972(b)(1)).

³⁰ See Appendix B (adopting 47 C.F.R. § 76.972(b)(2)).

³¹ See Appendix B (adopting 47 C.F.R. § 76.972(b)(3)).

³² See Appendix B (adopting 47 C.F.R. § 76.972(b)(4)).

³³ See Appendix B (adopting 47 C.F.R. § 76.972(b)(5)).

³⁴ See Appendix B (adopting 47 C.F.R. § 76.972(b)(6)).

³⁵ See Appendix B (adopting 47 C.F.R. § 76.972(b)(7)).

³⁶ See Appendix B (adopting 47 C.F.R. § 76.972(b)(8)).

³⁷ See Appendix B (adopting 47 C.F.R. § 76.972(b)(9)).

³⁸ See Appendix B (adopting 47 C.F.R. § 76.972(b)(10)).

³⁹ See Appendix B (adopting 47 C.F.R. § 76.972(b)(11)).

⁴⁰ See Appendix B (adopting 47 C.F.R. § 76.972(f)).

13. *Maintenance of Contact Information.* We require every cable system operator to maintain, on its website, a contact name, telephone number, and e-mail of an individual designated by the cable system operator to respond to requests for information about leased access channels. One of the more basic elements necessary to permit potential programmers reasonable access to cable systems is ready availability of a contact name, telephone number, and e-mail address of a cable system operator that the programmer can use to reach the appropriate person in the cable system to begin the process for requesting access to the system. Commenters complain about individuals located far from the local community. For example, RMI states that when a new programmer requests information about leased access, they are directed to a person headquartered over 130 miles away.⁴¹ CBA makes a similar complaint.⁴² NCTA, on the other hand, offers that leased access generally proceeds smoothly at the local level.⁴³ While the physical location of a person designated as the leased access contact should not be critical in the relationship between the potential programmer and the cable system operator, the identity of that person and the ease of access to him are critical. Other aspects of the rules we adopt here deal with expeditious and full responses to leased access requests. The fact that the designated person is located some distance away should not affect the timeliness and substance of responses.

14. *Timing for Response.* We amend our Rules to require a cable system operator⁴⁴ to respond to a request for information from a leased access programmer within three business days. The identity of a designated person by the cable system operator who the potential programmer can contact is important only if that person replies quickly and fully to the requests of the programmer. CaribeVH complains of poor responses to requests for leased access channel information, both in response time and in substance.⁴⁵ Engle complains that the cable operators typically ignore the requests for information regarding rates and available time slots or flat out refuse to give rates claiming there was “no time available.”⁴⁶ Positive Media, Inc. d/b/a TV Camden (“PMI”) states that when it tried to request leased access information from its local cable company, the company responded that it did not know about leased access.⁴⁷ Our current Rules provide for a 15 day response by cable system operators to a request by a potential programmer. That response must include information on channel capacity available, the applicable rates, and a sample contract if requested. That response time is unnecessarily long and, as discussed below, the information is inadequate. Cable operators must have leased access channel information available in order to be able to comply with the statute and our Rules. It does not take 15 days to provide a copy of that information to a potential leased access programmer. Three business days to reply to a request for such information is more than adequate. Accordingly, we are amending the response time permitted a cable system operator to three business days. We are also providing a more detailed list of information the operator must provide upon request within that time period. All of the

⁴¹ RMI Comments at 3.

⁴² CBA Comments at 3.

⁴³ NCTA Comments at 8.

⁴⁴ We retain the 30-day response period currently provided in Section 76.970(i)(2) of the Commission’s Rules for cable systems that have been granted small system special relief. See Appendix B (adopting 47 C.F.R. § 76.972(g)). In the *Second Report and Order*, we adopted this longer response period to minimize burdens on small systems while still ensuring that potential leased access programmers receive the required information in a timely fashion. See *Second Report and Order*, 12 FCC Rcd 5267, 5331 at ¶ 130. For these purposes, systems subject to small system relief are systems that either: (i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or (ii) Have been granted special relief. These rules remain unchanged here.

⁴⁵ See CaribeVH Comments at 2.

⁴⁶ See Engle Comments at 4.

⁴⁷ See PMI Comments at 2.

information required to be provided is necessary for a potential leased access programmer to be able to file a *bona fide* request for carriage. There is no reason to delay providing the leased access programmer with the information it needs to take the necessary steps to obtain access.

15. *Process for Requesting Leased Access Channels.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the process for requesting leased access channels. One element of the information the cable system operator must make available to the potential programmer within three business days of a request is an explanation of the cable system operator's process for requesting leased access channels. In addition to delayed and inadequate responses, commenters complain that they have to deal with a process and procedures that are difficult to understand and seem to exist only to provide resistance. For example, PMI states that when it tried to request leased access information from its local cable company, the company responded that it could provide no information about leased access.⁴⁸ PMI had to file a petition for relief with the Commission to get rates and channel availability. According to PMI, although the Commission requests the local programmer and the cable company to "negotiate" the terms and conditions of any contract for lease access, its experience with the contract negotiation process was that any request by PMI was kept out of the contract and every requirement the cable system made was included. PMI was forced to argue each point, backed with Commission precedent, to support its requests, and the cable system's actions had the effect of delaying and discouraging access to the leased access channels.⁴⁹ Accordingly, we are requiring that the cable system operator include an explanation of the operator's process and procedures for requesting leased access channels.

16. *Geographic Levels of Service that Are Technically Possible.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the geographic levels of service that are technically possible. Commenters complain that cable system operators make available only limited levels of service.⁵⁰ Typically, the service offered is defined by the size of the headend.⁵¹ CaribeVH points out that with the consolidation of headends, the headend approach is no longer efficient for a leased access programmer to obtain a channel serving the local needs of residents in discrete communities.⁵² As a result, "leased access programmers are . . . forced to purchase much larger areas at a much higher cost even if their programming is not relevant to the larger consolidated base."⁵³ CaribeVH asks the Commission to provide for leased access to local communities, as opposed to large consolidated cable systems.⁵⁴ MAP, on the other hand, asserts that the Commission should require cable operators to make rates available on a headend, regional, and national basis with price sheets available in public files and on request.⁵⁵ We will not require, at this time, the operator to allow the leased access programmer to serve discrete communities smaller than the area served by a headend if they are not doing the same with other programmers. We acknowledge that with the consolidation of headends, programmers may be forced to purchase larger areas at higher costs than they

⁴⁸ *Id.*

⁴⁹ *Id.* at 3.

⁵⁰ CaribeVH Comments at 12.

⁵¹ NCTA Reply Comments at 15 (citing *Roberts v. Houston Division of Time Warner Entertainment Co.*, 11 FCC Rcd. 5999, 6005-6007 (CSB 1996)).

⁵² CaribeVH Comments at 12.

⁵³ *Id.* at 12-13.

⁵⁴ *See id.* at 13.

⁵⁵ *See* MAP Comments at 13, 15.

would prefer. We will monitor developments in this area, and may revisit this issue if circumstances warrant. However, we will require cable system operators to clearly set out in their responses to programmers what geographic and subscriber levels of service they offer.

17. *Number, Location, and Time Periods Available for Each Leased Access Channel.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with the number, location, and time periods available for each leased access channel. One of the more common complaints raised by commenters was the difficulty they faced in determining just what channels were available, where they were located, and what time periods they were available.⁵⁶ Our current Rules provide, simply, that operators explain how much of the operator's leased access capacity is available.⁵⁷ CaribeVH asks that cable operators be required to provide, in addition, subscriber totals by headend, on each of the different tiers; specific channels availabilities, and a channel lineup; and information to verify leased access rates.⁵⁸ MAP asserts that programmers should have the ability to select the tier of their choice and to be secure in their channel placement.⁵⁹ Shop NBC believes that the Commission should make clear that certain cable operator practices are *per se* unreasonable, such as locating leased access programmers in channel positions with poor transmission quality or in a collective "cable Siberia," where they cannot easily be located by subscribers.⁶⁰ iNFO also requests better channel placement for leased access programmers and points out that its leased access application was denied by Comcast because the market requested could not be segregated from a larger market.⁶¹ iNFO states that as a result of a settlement, and almost thirty months and \$28,000 of legal expenses, iNFO eventually gained the rights to a leased access channel.⁶² It notes that it was placed where there are no channels close to it.⁶³ Our current leased access channel placement standards provide that programmers be given access to tiers that have subscriber penetration of more than 50 percent.⁶⁴ We will not change that requirement, but we will expand on the current requirement relating to capacity in Section 76.970(i) to require cable system operators to provide, in their replies to requests from programmers, the specific number and location and time periods available for each leased access channel. This greater degree of certainty should assist programmers in their evaluations.

18. *Explanation of Currently Available and Occupied Leased Access Channels.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with an explanation of currently available and occupied leased access channels. Several commenters complain that cable operators give delayed, false, or misleading information as to leased access capacity and availability.⁶⁵ NCTA states that it may be difficult to specify which channel is available for use at the time of the request because that information may not be readily available if the

⁵⁶ See CaribeVH Comments at 3.

⁵⁷ 47 C.F.R. § 76.970(i)(1)(i).

⁵⁸ CaribeVH Comments at 3.

⁵⁹ MAP Comments at 15.

⁶⁰ Shop NBC Comments at 16.

⁶¹ See iNFO Comments at 1, 2.

⁶² See *id.* at 2.

⁶³ See *id.*

⁶⁴ 47 C.F.R. § 76.971(a)(1).

⁶⁵ See PBC Comments at 1; CaribeVH Comments at 2; Engle Comments at 4; PMI Comments at 2.

lessee is requesting that an operator open up a new channel for leasing.⁶⁶ We disagree with NCTA's assertion. Section 612 of the Communications Act imposes specific requirements on cable operators with regard to leased access.⁶⁷ It is inherent in these obligations to be able to provide timely and accurate information to prospective leased access programmers. Within three business days of a request by a current or potential leased access programmer, a cable operator shall provide information documenting: (1) the number of channels that the cable operator is required to designate for commercial leased access use pursuant to Section 612(b)(1); (2) the current availability of those channels for leased access programming on a full- or part-time basis; (3) the tier on which each leased access channel is located; (4) the number of customers subscribing to each tier containing leased access channels; (5) whether those channels are currently programmed with non-leased access programming; and (6) how quickly leased access channel capacity can be made available to the prospective leased access programmer. We believe this information is vital to enable leased access programmers to make an informed decision regarding whether to pursue leased access negotiations with a cable operator. Provision of this information will also benefit cable operators by timely informing leased access programmers of current leased access timing and availability, and thereby eliminating leased access requests that cannot be accommodated by existing leased access availability.

19. *Schedule and Calculation of Leased Access Rates.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with a schedule and calculation of its leased access rates. Numerous commenters complain that cable operators failed to provide timely information on leased access rates or on how such rates are calculated.⁶⁸ MAP asserts that the Commission should require cable operators to make rates available on a head-end, regional, and national basis with price sheets available in public files and on request.⁶⁹ NCTA points out that operators are required to maintain sufficient supporting documentation to justify their rates, including information that shows the calculations of the implicit fees, and this information must be available for demonstration to the Commission.⁷⁰ As with information regarding available and occupied leased access channels, we believe Section 612 imposes on cable operators the obligation to provide a timely and accurate explanation of its leased access rates to prospective leased access programmers. Indeed, as conceded by NCTA, this obligation is not new.⁷¹ Rather, we merely amend the time required for providing this information to prospective leased access programmers. Accordingly, within three business days of a request by a current or potential leased access programmer, a cable operator shall provide information documenting the schedule of all leased access rates (full- and part-time) available on the cable system. Cable operators must attach to this schedule a separate calculation detailing how each rate was derived pursuant to the revised rate formula adopted herein.⁷² This information will assist leased access programmers in determining whether leased access capacity on a given cable system is economically feasible. In addition, the rate calculations will further assist leased access programmers in determining whether particular cable operators are complying with their leased access obligations.

20. *Explanation of Any Rates Associated with Technical or Studio Costs.* Included in the customer standards we are adopting today is a requirement that a cable operator provide a prospective

⁶⁶ NCTA Comments at 12.

⁶⁷ 47 U.S.C. § 532.

⁶⁸ See CaribeVH Comments at 2-3; Engle Comments at 4; PMI Reply Comments at 2; iNFO Comments at 1.

⁶⁹ MAP Comments at 13, 15.

⁷⁰ NCTA Reply Comments at 9.

⁷¹ See *id.*

⁷² See *infra* ¶¶ 35-49 (discussing the revised leased access rate calculation).

leased access programmer, within three business days of a request, with a list of fees for providing technical support or studio assistance to the leased access programmer along with an explanation of such fees and how they were calculated. We note that our Rules require leased access providers to reimburse cable operators “for the *reasonable* cost of any technical support the operators actually provide.”⁷³ Further, our rate calculation includes technical costs common to all programmers so that cable operators may not impose a separate charge for technical support they already provide to non-leased access programmers.⁷⁴ Commenters note incidents they assert constitute cable operator overcharging, such as imposing a technical fee of \$51.49 to insert a tape into a machine.⁷⁵ Although we do not have all of the facts before us regarding this specific allegation, a substantial charge for a minor task is the type of conduct we would find unreasonable. iNFO states that, although it only reached one market zone, it was required to buy modulators for four other zones and that the iNFO channel had a signal quality significantly inferior to other channels.⁷⁶ At this time, we will not prescribe an hourly rate for technical support, but instead will monitor the effectiveness of the new customer standards that require that cable operators list up front any technical fees along with an explanation of the fee calculation. If leased access programmers have continued problems with high technical or studio cost, we will consider implementing a more specific solution.

21. *Programming Guide Information.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with all relevant information for obtaining carriage on the program guide(s) provided on the operator’s system. Moreover, we expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service. MAP states that viewers cannot identify whether programming designated “paid programming” on a channel guide is local or ethnic programming or an infomercial.⁷⁷ CaribeVH argues for a requirement that cable operators list leased access programming in their printed cable guides and on the electronic guides on the system.⁷⁸ NCTA argues that cable operators must be able to differentiate between the program services that they have chosen and leased access channels in the program guide and that it is impossible to include part-time leased access programming in program guides.⁷⁹ Comcast states that, like other MVPDs, it relies upon third parties to provide the data content for its electronic program guides and data generally needs to be supplied to these “metadata aggregators” on a timetable that is not consistent with leased access arrangements.⁸⁰ Because of the dynamic nature of leased access programming, we believe that it would be impracticable to impose a requirement on cable operators to include all leased access listings in their programming guides. However, we believe that, in situations where time permits and the leased access programming information is submitted as reasonably required by the cable operators, cable operators must ensure that leased access programming information is incorporated in its program guide to the same extent that it does so for non-leased access programmers. In order to accomplish this, cable operators are required to provide potential leased access programmers with all relevant information for obtaining carriage on the program guide(s) provided on the operator’s

⁷³ 47 C.F.R. § 76.971(c) (emphasis added).

⁷⁴ *Second Report and Order*, 12 FCC Rcd at 5324, ¶ 114.

⁷⁵ See RMI Comments at 4.

⁷⁶ See *id.*

⁷⁷ MAP Comments at 12; see iNFO Comments at 2.

⁷⁸ CaribeVH Comments at 10.

⁷⁹ NCTA Comments at 14.

⁸⁰ Comcast Comments at 16.

system.⁸¹ This information shall include the requirements necessary for a leased access programmer to have its programming included in the programming guide(s) that serve the tier of service on which the leased access provider contracts for carriage. At a minimum, the cable operator must provide: (1) the format in which leased access programming information must be provided to the cable operator for inclusion in the appropriate programming guide; (2) the content requirements for such information; (3) the time by which such programming information must be received for inclusion in the programming guide; and (4) the additional cost, if any, related to carriage of the leased access programmer's information on the programming guide. We expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service.

22. *Methods of Programming Delivery.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with available information regarding all acceptable, standard methods for delivering leased access programming to the cable operator. MAP argues that, although cable systems are now capable of a wide variety of delivery systems that would allow leased access programmers an opportunity to narrowly tailor their coverage to niche audiences, cable operators refuse to allow leased access programmers with access to these technologies.⁸² MAP asserts that the additional fees charged by cable operators for services such as tape insertion correspond to no discernible economic variable and should be prohibited.⁸³ CBA complains of the insistence by cable operators on prohibitively expensive delivery methods and insistence on payment for equipment that the leased access provider does not need, as well as prohibitive technical fees.⁸⁴ With regard to cable operators restricting programming delivery technology, NCTA argues that the Commission's has already determined that operators "do not have any responsibility for assisting in the delivery of programming from a programmers' studio or production facility to the headend or input point of the cable system."⁸⁵ Comcast replies that the leased access programmers' request that the Commission allow them to deliver their programming to cable operators by any means they choose, including "tape, DVD, [I]nternet, coax, fiber, an unlicensed frequency wireless microwave, IPTV, or any current or new technology," is unrealistic, and would increase cable operators' technical costs.⁸⁶

⁸¹ We acknowledge that there are various programming guides and services. For example, on many analog tiers of service cable operators provide a dedicated programming guide channel in which current and upcoming programming choices are provided through a continuous on-screen scroll. In addition, on most digital tiers of service, subscribers have available an electronic programming guide which provides extensive program information, search capability and channel navigation functions. The rules we adopt today apply to all programming guides however provided to the subscriber, including printed formats.

⁸² See generally MAP Comments at 11.

⁸³ MAP Reply Comments at ii; see RMI Comments at 4. For example, RMI contends that one cable operator requires each program to have its own playback deck, and although programmers are not required to lease the deck, they are required to pay a technical fee of \$51.49 each time a tape is inserted into the machine in addition to the maximum applicable air time rates for that time slot. RMI was told that this fee is "used to reimburse for staff, equipment usage, and studio costs." According to RMI's estimated calculations, at that rate, it only takes five tape insertions before the equipment investment is completely paid in full. RMI Comments at 4. According to iNFO, one operator required nearly one year of lease payments to secure the lease, and that it was required to buy approximately \$25,000 worth of equipment for signal modulation before its channel could be cable-cast. iNFO Comments at 2.

⁸⁴ CBA Comments at 3-4.

⁸⁵ See NCTA Comments at 15-16 (citing *Engle Broadcasting v. Comcast of Southern N.J.*, 16 FCC Rcd. 17650, 17653 (2001)).

⁸⁶ Comcast Comments at 18.

23. Because of the variable circumstances experienced by each cable system, we cannot establish a list of acceptable, standard delivery methods for leased access programming applicable to all cable systems. However, we believe that it incumbent upon a cable operator to provide prospective leased access programmers with sufficient information to be able to gauge the relative difficulty and expense of delivering its programming for carriage by the cable operator. A cable operator must make available information to leased access programmers regarding all acceptable, standard methods for delivering leased access programming to the cable operator. For each method of acceptable, standard delivery, the cable operator shall provide detailed instructions for the timing of delivery, the place of delivery, the cable operator employee(s) responsible for receiving delivery of leased access programming, all technical requirements and obligations imposed on the leased access programmer, and the total cost involved with each acceptable, standard delivery method that will be assessed by the cable operator. We clarify, however, that cable operators must give reasonable consideration to any delivery method suggested by a leased access programmer. A leased access programmer that is denied the opportunity to deliver its programming via a reasonable method may file a complaint with the Commission. In such complaint proceeding, the burden of proof shall be on the cable operator to demonstrate that its denial was reasonable given the unique circumstances of its cable system.

24. *Comprehensive Sample Leased Access Carriage Contract.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with a comprehensive sample leased access carriage contract. We also require a cable system operator in its leased access carriage contract to apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers. MAP states that the Commission should require cable operators to include leased access contracts in their public files and to provide annual reports on the use of leased access.⁸⁷ PMI supports a standard leased access downloadable form to eliminate useless delay tactics used by cable systems.⁸⁸ CaribeVH urges the Commission to set specific requirements such as a one-year minimum contract length for a leased access programmer seeking a 24/7 channel for an extended period.⁸⁹ NCTA states that most cable operators typically have standard form contracts that they make available to leased access users within the prescribed 15 day time frame or sooner and delays are due to lessees' proposed changes.⁹⁰ Comcast states that there is no basis for the Commission to adopt a standardized leased access contract.⁹¹

25. We agree with the commenters that propose that cable operators be required to supply a sample leased access agreement to prospective leased access programmers. NCTA admits that most cable operators already maintain such contracts and share them with prospective leased access programmers. We do not intend by this requirement to infringe the freedom of contract of either party and expressly clarify that neither the cable operator nor the prospective leased access programmer need abide by any of the terms and conditions set forth in the sample contract. Instead, we believe that the provision of such agreements by cable operators serve to inform leased access programmers of terms and conditions that are generally acceptable to the cable operator and will be a useful first step in the initiation of leased access negotiations. Accordingly, within three business days of a request by a current or potential leased access programmer, a cable operator shall provide a copy of a sample leased access carriage contract setting forth what the cable operator considers to be the standard terms and conditions for a leased access

⁸⁷ MAP Comments at 13.

⁸⁸ PMI Comments at 4.

⁸⁹ CaribeVH Comments at 6.

⁹⁰ NCTA Comments at 11.

⁹¹ Comcast Comments at 19.

carriage agreement.

26. As discussed below, we also require cable system operators to apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers. Leased access programmers complain of leased access contract terms and conditions that are unfair, unreasonable, onerous, and overly burdensome or discriminatory.⁹² Specific unreasonable terms and conditions complained about include unfair promotion and marketing practices;⁹³ system-by-system leasing requirements;⁹⁴ insurance and security deposits;⁹⁵ discriminatory treatment in comparison with other commercial programmers;⁹⁶ unfair treatment of LPTV broadcasters;⁹⁷ tier and channel placement issues;⁹⁸ VOD platform issues;⁹⁹ exclusion from electronic program guides;¹⁰⁰ excessive technical and other fees;¹⁰¹ and inflexible delivery systems.¹⁰² Commenters ask that we address certain contract issues that arise in negotiations. Rather than dictate specific reasonable terms and conditions, we require that cable system operators apply the same uniform standards, terms, and conditions to leased access programmers as it applies to its other programmers.

27. The Commission has stated in the past that the reasonableness of specific terms and conditions will be determined on a case-by-case basis, but set broad guidelines for tier placement and a general standard of reasonableness for contract terms and conditions.¹⁰³ Although we conclude that each complaint regarding unreasonable terms and conditions will continue to be reviewed on a case-by-case basis, we set out herein additional guidelines that will help to narrow the range of reasonable practices, terms, and conditions. For example, numerous parties complain about a requirement to carry insurance indemnifying the cable system operator. The Commission has held that requiring a leased access programmer to obtain reasonable liability insurance coverage does not constitute a violation of the leased access regulations.¹⁰⁴ Although the Commission has not adopted specific conditions or limits regarding the amount of coverage or the type of insurance policy that operators may require, the Commission does require that insurance requirements be reasonable in relation to the objective of the requirement.¹⁰⁵ The

⁹² CaribeVH Comments at 4; Engle Comments at 4; iNFO Comments at 2; LAPA Comments at 3; MAP Comments at 16; PMI Comments at 3; PBC Comments at 1; RMI Comments at 3, *et seq.*; Shop NBC Comments at 2.

⁹³ See CaribeVH Comments at 9-10.

⁹⁴ See CaribeVH Comments at 14; Combonate Comments at 1-4; LAPA Comments at 5; MAP Comments at 15; Combonate Reply Comments at 4.

⁹⁵ See CaribeVH Comments at 8-9; CBA Comments at 4 n.8; Engle Comments at 4; HTV Comments at 3; LAPA Comments at 3; PBC Comments at 1; RMI Comments at 11-12; PBC Reply Comments at 2.

⁹⁶ See LAPA Comments at 9; PBC Comments at 1.

⁹⁷ See CBA Comments at 3-5; RMI Comments at 4-14; RMI Reply Comments at 2.

⁹⁸ See CaribeVH Comments at 7-8; LAPA Comments at 5; ShopNBC Comments at 16-17.

⁹⁹ See MAP Comments at 11.

¹⁰⁰ See CaribeVH Comments at 10; iNFO Comments at 2; MAP Comments at 11-12.

¹⁰¹ See MAP Comments at 2; RMI Comments at 4-6; RMI Reply Comments at 2.

¹⁰² See CBA Comments at 3; RMI Comments at 6-10; RMI Reply Comments at 2.

¹⁰³ *Rate Order*, 8 FCC Rcd at 5936; *Second Report and Order*, 12 FCC Rcd at 5309.

¹⁰⁴ See *Campbell v. TW Cable – St. Augustine*, CSR 5234-L (CSB 1998).

¹⁰⁵ See *Second Report and Order*, 12 FCC Rcd at 5323.

Commission also placed on cable operators the burden of proof in establishing reasonableness.¹⁰⁶ The Commission stated that reasonable insurance requirements are based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors.¹⁰⁷ In a recent case, the Media Bureau found that the cable system provided no evidence establishing the reasonableness of its insurance requirement, such as whether the insurance was required of non-leased access programmers, whether the cable system operator had incurred litigation costs in the context for which it need indemnification, or even that the likelihood that the programming at issue would pose a liability risk.¹⁰⁸

28. We will continue to address complaints about specific contract terms and conditions on a case-by-case basis. We emphasize that in all cases, the Commission will evaluate any complaints pursuant to a reasonableness standard. We also clarify that a cable system operator may not continue to include terms and conditions in new contracts that previously have been held to be unreasonable by the Commission. Not only are our orders binding on the affected parties to a leased access complaint, but unless and until an order is stayed or reversed by the Commission, a cable system operator is under an obligation to follow the Commission's Rules and precedent in setting its practices, terms, and conditions.

29. Because we do not think that every potential leased access programmer should be required to file a complaint to determine if every term in its contract is reasonable, we will require the cable operator to provide, along with its standard leased access contract, an explanation and justification, including a cost breakdown, for any terms and conditions that require the payment or deposit of funds. This includes insurance and deposit requirements, any fees for handling or delivery, and any other technical or equipment fees, such as tape insertion fees. This will allow the leased access programmer to determine whether the cost is reasonable and expedite any review by the Commission. For example, we note that RMI contends that one cable operator charges leased access programmers a fee of \$51.49 each time a tape is inserted into a playback deck.¹⁰⁹ We believe that requiring a cable operator to provide an explanation and justification for such a fee will encourage cable operators to impose only reasonable fees or, at least, facilitate the filing of a leased access complaint demonstrating that such a fee is unreasonable.

30. With regard to non-monetary terms and conditions, such as channel and tier placement, targeted programming, access to electronic program guides, VOD, etc., we similarly require the cable operator to provide, along with its standard leased access contract, an explanation and justification of its policy. For example, with regard to the geographic scope of carriage, if a leased access programmer requests to have its programming targeted to a finite group of subscribers based on community location, unless the operator agrees to the request, it must not provide such limited carriage to other programmers or channels. To the extent the cable operator denies the request for limited carriage, the cable operator must provide an explanation as to why it is technically infeasible to provide such carriage. If limited carriage is technically feasible, the cable operator must provide a fee and cost breakdown for such carriage for comparison with similar coverage provided for non-leased access programmers.

31. Similarly, with regard to tier placement and channel location, we require the cable operator to provide, along with its standard leased access contract, an explanation and justification of its policy regarding placement of a leased access programmer on a particular channel as well as an explanation and

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See United Productions v. Mediacom Communications Corporation*, CSR 6336-L, Order, 22 FCC Rcd 1224 (MB 2007).

¹⁰⁹ *See RMI Comments at 4.*

justification for the cable operator's policy for relocating leased access channels. To the extent a request for a particular channel is denied, the cable operator must provide a detailed explanation and justification for its decision.

32. *Launch Date.* We require a cable system operator within three business days of a request to provide a prospective leased access programmer with information regarding prospective launch dates for the leased access programmer. Moreover, we require cable operators to launch leased access programmers within a reasonable amount of time. We consider 35-60 days after the negotiation is finalized to be a reasonable amount of time for launch of a programmer, unless the parties come to a different agreement. We note that this time frame affords cable operators sufficient time to satisfy the requirement, if applicable, to provide subscribers with 30-days written notice in advance of any changes in programming services or channel positions.¹¹⁰ While CaribeVH urges the Commission to adopt a requirement that a cable operator launch a leased access programmer within 10-60 days after the programmer requests leased access information, we find that this would be unnecessarily disruptive for cable operators because not all leased access programmers that request information agree to the terms for carriage.¹¹¹ Requiring the cable operator to launch the leased access programmer within 35-60 days after negotiations are finalized mitigates this concern.

ii. Response to Bona Fide Proposals for Leased Access

33. We adopt Rules to ensure that cable system operators respond to proposals for leased access in a timely manner and do not unreasonably delay negotiations for leased access. As leased access programmers explain, some cable operators have demonstrated an unwillingness to respond to a proposal for leased access or to negotiate with a leased access programmer in a timely manner, thereby impeding access to leased access channel capacity.¹¹² To address this concern, after the cable system operator provides the information requested above, in order to be considered for carriage on a leased access channel, we require a leased access programmer to submit a proposal for carriage by submitting a written proposal that includes the following information: (1) The desired length of a contract term; (2) The tier, channel and time slot desired; (3) The anticipated commencement date for carriage; (4) The nature of the programming; (5) The geographic and subscriber level of service requested; and (6) Proposed changes to the sample contract.¹¹³ The cable system operator must respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.¹¹⁴ This same response deadline will apply until an agreement is reached or negotiations fail.

34. Failure to provide the requested information will result in the issuance of a notice of apparent

¹¹⁰ See 47 C.F.R. §§ 76.1603(b), (c); *see also* NCTA Reply Comments at 12 (noting that cable operators must have sufficient time to provide franchising authorities and customers of changes in channel line-ups).

¹¹¹ CaribeVH argues for time limits for launch dates, such as no later than thirty-five (35) days after the execution of a contract in the event there is a thirty (30) day customer notice requirement, and in other cases ten (10) days and no later than sixty (60) days from a bona fide request for information by the leased access programmer. *See* CaribeVH Comments at 12. *But see* NCTA Reply Comments at 12 n.37 (noting that not all potential leased access programmers that request information eventually agree to the terms for carriage, thereby making a launch date within 60 days of a request for information disruptive for cable operators).

¹¹² *See* CaribeVH Comments at 2; Engle Comments at 4; iNFO Comments at 1; PMI Comments at 2; PBC Comments at 1.

¹¹³ *See* Appendix B (adopting 47 C.F.R. § 76.972(c)).

¹¹⁴ *See* Appendix B (adopting 47 C.F.R. § 76.972(e)).

liability ("NAL") including a forfeiture in the amount of \$500.00 per day.¹¹⁵ A potential leased access programmer need not file a formal leased access complaint pursuant to Section 76.975 of the Commission's Rules in order to bring a violation of our customer service standards to our attention.¹¹⁶ Rather, the programmer may notify the Commission either orally or in writing, and where necessary the Commission will submit a Letter of Inquiry ("LOI") to the cable operator to obtain additional information. A cable system which is found to have failed to respond on time with the required information will be issued an NAL. The same process and forfeiture amount will apply for the failure to timely respond to a proposal as for the failure to comply with an information request. We rely on our general enforcement authority under Section 503 of the Communications Act to impose forfeitures in appropriate cases.¹¹⁷

iii. Leased Access Rates

a. Maximum Rate for Leasing a Full Channel

35. *Background.* The Commission's current Rules calculate leased access rates for all tiers that have subscriber penetration of more than 50 percent. Upon request, cable operators generally must place leased access programmers on such a tier.¹¹⁸ To determine the average implicit fee for a full-time channel on a tier with a subscriber penetration over 50 percent, an operator first calculates the total amount it receives in subscriber revenue per month for the programming on all such tiers, and then subtracts the total amount it pays in programming costs per month for such tiers (the "implicit fee calculation"). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) is used to determine how much of the total will be recovered from a particular tier.¹¹⁹ To calculate the average implicit fee per channel, the implicit fee for the tier is divided by the number of channels on the tier. The final result is the rate per month that the operator may charge the leased access programmer for a full-time channel on that tier. Where the leased access programmer agrees to carriage on a tier with less than 50 percent penetration, the average implicit fee is determined using subscriber revenues and programming costs for only that tier. The implicit fee for full-time channel placement as an a la carte service is based upon the revenue received by the cable operator for non-leased access a la carte channels on its system.

36. In this Order we modify the method for determining the leased access rate for full-time carriage on a tier. We harmonize the rate methodology for carriage on tiers with more than 50% subscriber penetration and carriage on tiers with lower levels of penetration by calculating the leased access rate based upon the characteristics of the tier on which the leased access programming will be placed. Cable operators will calculate a leased access rate for each cable system on a tier-by-tier basis which will adequately compensate the operator for the net revenue that is lost when a leased access programmer displaces an existing program channel on the cable system. In addition, the Order sets a maximum allowable leased access rate of \$0.10 per subscriber per month to ensure that leased access remains a viable outlet for programmers. At this time we leave the method for calculating rates for a la carte carriage unchanged.

¹¹⁵ Although the Commission's forfeiture guidelines establish a baseline forfeiture of \$7,500.00 per day for violation of the leased access rules, we find at this time that a \$500.00 per day penalty should be adequate to encourage prompt compliance with the customer services obligations. See 47 C.F.R. § 1.80.

¹¹⁶ See 47 C.F.R. § 76.975.

¹¹⁷ See 47 U.S.C. § 503.

¹¹⁸ 47 C.F.R. § 76.971(a)(1).

¹¹⁹ 47 C.F.R. § 76.971(e).

37. As an initial matter, we conclude that we will not apply this new rate methodology to programmers that predominantly transmit sales presentations or program length commercials. These programmers often “pay” for carriage -- either directly or through some form of revenue sharing with the cable operator. In our previous Order, we set the leased access rate for a la carte programmers at the “highest implicit fee” partly out of a concern that lower rates would simply lead these programmers to migrate to leased access if it were less expensive than what they are currently “paying” for carriage. Such a migration would not add to the diversity of voices and would potentially financially harm the cable system. Similarly, we do not wish to set the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements. We will seek comment in the Further Notice of Proposed Rulemaking on whether leased access is affordable at current rates to programmers that predominantly transmit sales presentations or program length commercials and whether reduced rates would simply cause migration of existing services to leased access.

b. The Marginal Implicit Fee

38. The purposes of Section 612 are “to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.”¹²⁰ Because Section 612 also requires that the price, terms and conditions for leased access be “at least sufficient to assure that such use will not adversely affect the operation, financial condition or market development of the cable system,”¹²¹ the Commission is faced with balancing the interests of leased access programmers with those of cable operators. We believe that our method provides a cable operator with a leased access rate that will allow the operator to replace an existing channel from its cable system with a leased access channel without experiencing a loss in net revenue.¹²² In addition, since we are required to balance the revenue requirement of cable operators and that of leased access programmers, we will assume that the cable operator will elect to replace a channel which does not generate a significant amount of the total net revenue of the system. We refer to this channel as the marginal channel and use the marginal implicit fee to determine leased access rates. Our method was intended to promote the goals of competition and diversity of programming sources while doing so in a manner consistent with growth and development of cable systems.¹²³

39. Based on the wide variance between the actual use of leased access and the goals stated in the law, it appears that the current “average implicit fee” formula for tiered leased access channels yields fees that are higher than the statute mandates, resulting in an underutilization of leased access channels. According to the Commission’s most recent annual cable price survey, cable systems on average carry

¹²⁰ Communications Act § 612(a), 47 U.S.C. § 532(a).

¹²¹ Communications Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

¹²² While we do not believe that our method for determining leased access rates will result in cable operators experiencing any loss in net revenue, the relevant statutory provision does not require such a finding. As explained above, Section 612(c)(1) provides that the “prices, terms and conditions” of use must be “at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.” We interpret this provision to restrict “prices, terms, and conditions” of leased access use that materially affect the financial health of a cable system. We do not interpret the provision to require that cable operators experience no loss in revenue whatsoever as a result of leased access use. Thus, even if we were to conclude that our method for determining leased access rates would have some impact on cable operators’ revenue, we would still adopt this method because we are confident that any impact on operators’ revenue would not be of sufficient magnitude to materially affect the financial health of cable systems.

¹²³ *Second Report and Order*, 12 FCC Rcd at 5272, ¶ 8.

only 0.7 leased access channels.¹²⁴ Shop NBC asserts that due to the “average implicit fee” rate formula leased access remains unaffordable to large and small independent programmers alike.¹²⁵ WBGN contends that the rate formula has contributed to the failure of the leased access system.¹²⁶ Because our Rules are not achieving their intended purpose, we are revisiting decisions made in the *Second Report and Order* establishing the maximum leased access rates in order to make the leased access channels a more viable outlet for programming.¹²⁷ Throughout its implementation of Section 612, the Commission has recognized that the Rules adopted would need refinement as specifics regarding how the leased access rules were functioning became available.¹²⁸

40. In the NPRM, we sought comment on the current rate formula and how any proposed changes would better serve Congress’s statutory objectives.¹²⁹ Some commenters suggest that the Commission depart from the implicit fee approach.¹³⁰ Some commenters propose a universal flat rate per subscriber per month.¹³¹ We agree that such an approach offers some appealing aspects in terms of ease of administration and consistency of leased access charges across cable operators. As the Commission expressed in the *Second Report and Order*, however, “the fundamental limitation with a flat rate approach is selecting a rate that is appropriate for all cable systems.”¹³² Due to the variances in channel line-ups and tier prices of cable systems, in most instances, a flat rate would either over- or undercompensate cable operators. As discussed below, however, we will set a cap on the maximum rate that cable operators may charge in order to prevent the construction of tiers in a manner that makes leased access rates excessively high.

41. We agree with Shop NBC’s assertion that the average implicit fee overcompensates cable operators because it reflects the *average* value of a channel to the cable operator instead of the value of the channel replaced.¹³³ We will make adjustments to the rate calculations that should lower prices by using the marginal implicit fee rather than the average. The result is intended to promote the goals of leased access by providing more affordable opportunities for programmers without creating an artificially low rate.

42. The legislative history provides that the leased access provisions are “aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator

¹²⁴ Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, 21 FCC Rcd 15087 at ¶ 9 (2006) (“2006 Cable Industry Prices Report”)

¹²⁵ Shop NBC at 4. See also Ex parte presentation of Community Broadcasters Association at 2 (Jul. 20, 2007) (claiming the average implicit fee places leased access beyond the reach of most parties).

¹²⁶ WBGN at 2.

¹²⁷ See S. Rep. No. 102-92 at 79 (1991) (“it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers”)

¹²⁸ *First Report and Order*, 8 FCC Rcd at 5936, ¶ 491. See also *Second Report and Order*, 12 FCC Rcd at 5282, ¶ 31 (“We will, however, continue to monitor the availability of leased access channels and may revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate”).

¹²⁹ NPRM, 22 FCC Rcd 11222, ¶ 8.

¹³⁰ See e.g., MAP Comments at 13 (proposing actual cost method).

¹³¹ Shop NBC Comments at 9, MAP Comments at 13, Engle Broadcasting at 2.

¹³² *Second Report and Order*, 12 FCC Rcd at 5294, ¶ 53.

¹³³ Shop NBC Comments at 5.

may elect not to provide that service as part of the program offerings he makes available to subscribers”¹³⁴ To promote this legislative purpose the Commission should set the leased access rates as low as possible consistent with the requirement to avoid any negative financial impact on the cable operator. One may assume that the cable operator, faced with a requirement to free up a channel for leased access, would have its own incentives to elect to replace one of the channels with the lowest implicit fee. But even if this is not the case, the discussion above suggests that the Commission should set its rules to encourage such a result. This dictates, at least in principle, the use of the lowest implicit fee, which we refer to as the “marginal implicit fee.” And it supports the conclusion that the current “average implicit fee” criterion for tiered channels is higher than warranted by the statute and may be impeding, rather than promoting, the goals of competition and diversity of programming sources. These rules provide cable operators a higher return for lost channel capacity than the value the cable operator would have received if the channel was not used for leased access programming.¹³⁵ We will adopt a method which eliminates this excess recovery. This method remains faithful to the statutory requirements while more appropriately balancing the interests of cable operators and leased access programmers.

c. The Cable Operator’s Net Revenue from a Cable Channel

43. Cable channels are sold in bundles of channels known as tiers. It is therefore not possible to directly observe the revenue per subscriber a cable operator earns from carrying an individual channel included in a tier. We therefore approximate the revenue earned by those channels on the tier. To do so we assume that the revenue generated by each channel is directly proportional to the per subscriber affiliation fee paid by the cable operator to the programmer. The first step in the calculation is to determine this factor of proportionality which we refer to as the mark-up. To do so, the cable operator will take the total subscriber revenue for the programming tier at issue and divide by the total of the affiliation fees that the cable operator pays to the programmers for the channels on that tier.¹³⁶ This calculation will generate the mark-up of channels that are sold on the tier. The gross revenue per subscriber due to carriage of a specific channel on the tier is then simply the per subscriber affiliation fee paid to the programmer for the specific channel multiplied by the mark-up.¹³⁷ The net revenue per subscriber earned by the cable operator from the channel is the difference between the gross revenue per subscriber and the per subscriber affiliation fee paid by the cable operator. This value represents the implicit fee for the channel.

d. The Net Revenue of the Marginal Channel

44. The net revenue per subscriber is the reduction in profit a cable operator would experience if it did not carry the channel in question. In our previous method for calculating leased access rates the calculation was based the average net revenue of all channels carried by the cable operator. In our new method, we base the leased access rate on the net revenue of the least profitable channels voluntarily carried by the cable operators on the tier where the leased access programming will be carried. We do so

¹³⁴ H.R. 98-934 at 47. See also Second Report and Order, 12 FCC Rcd at 5273, ¶ 10.

¹³⁵ The “average implicit fee” is calculated based on the average value of all of the channels in a tier instead of the value of the channels most likely to be replaced.

¹³⁶ For the purposes of defining the price of a tier and the channels on the tier we adopt the incremental approach in cases where the cost and channels of one tier are implicitly incorporated into larger tiers. For example, when the expanded basic tier incorporates the basic tier, the expanded basic tier price is the retail price of the expanded basic tier less the retail price of the basic tier and the channels on the expanded basic tier are those that are not available on the basic tier. A similar adjustment is required of other tiers which are not sold on an incremental basis.

¹³⁷ It is our understanding that some programming contracts specify a single rate for a group, or bundle, of channels. In these cases, for the purposes of determining the per subscriber affiliation fee for one of the bundled channels, the fee in the contract shall be allocated in its entirety to the highest rated network in the bundle.

because this represents an approximation of the minimum net revenue a network must generate in order for the cable operator to consider carrying it on the tier. As mentioned, we examine the net revenue of channels that are voluntarily carried by the cable operator. From this calculation we exclude channels whose carriage is mandated by statute, regulation, or franchise agreement. These mandated channels consist of broadcast stations that are subject to the must-carry rules as well as public, educational, and governmental ("PEG") channels that are carried pursuant to a franchise agreement. In addition, broadcaster's multi-cast channels are also excluded from the marginal channels. Our goal is to base the leased access rate on the net revenue of channels which are subject to free market negotiations over the carriage decision and affiliation fee. It is the net revenue of these types of channels which provides an indication of the net revenue that would be forgone when a cable operator devotes channel capacity to a leased access programmer since the cable operator would be unable to displace a broadcast station or PEG channel.

45. We identify the least profitable, or marginal, channels using the fraction of activated channels that a cable operator is statutorily required to make available for commercial leased access. The leased access rate is the mean value of net revenue earned by the lowest earning channels on the tier, up to the designated leased access fraction of qualifying channels on the tier. For example, in the case of a cable system with 100 activated channels and 40 channels on the expanded basic tier, the mean value of the net revenue of the 6 channels with the lowest net revenue will be the leased access rate for carriage on the expanded basic tier. We use the mean rather than the minimum value because use of the minimum would undercompensate the cable operator if more than one leased access channel was carried because, presumably, all channels other than the minimum earn higher net revenues. Use of the mean ensures that if the cable operator carries the statutory maximum number of leased access channels by displacing the lowest earning channels on its system, the cable operator will be fully compensated for lost revenue.

46. Appendix D of this Order presents an example of the calculation of the leased access rates for a hypothetical cable system.

e. Determining the Maximum Allowable Leased Access Rate

47. We recognize that our tier-based calculation method may lead to inequitable results in situations when a tier carries only a few non-mandated programming networks in combination with a large amount of mandated programming. This may create incentives among cable operators to design programming tiers that are unaffordable for leased access programmers. Such an outcome would contravene our statutory directive. Therefore we institute a maximum allowable rate based upon industry-wide cable operator programming costs and revenues. This will ensure that leased access programmers can reach consumers in all areas of the country. We will permit cable operators to seek a waiver of the maximum allowable rate to ensure no unreasonable financial burden is put on any cable operator. The maximum allowable leased access rate will apply to carriage on any tier in which the operator-specific leased access rate for the tier exceeds the maximum allowable rate.

48. We take several approaches to calculating this maximum rate. For example, we calculate the maximum rate utilizing a methodology based on per-subscriber affiliation fees that compensates systems that must vacate a channel in order to provide capacity to a commercial leased access programmer. We also calculate the maximum allowable leased access rate using a method that follows the one used to calculate the system-specific rates. In both cases, maximum rates for each of the analog and digital tiers are no greater than \$0.10 per subscriber per month.¹³⁸ Therefore, the maximum leased access rate will not exceed \$0.10 per subscriber per month for any cable system.

49. Cable operators may petition the Commission to exceed the maximum allowable leased

¹³⁸ The methods are detailed in Appendix D.

access rates. A petition for relief must present specific facts justifying the system's specific leased access rate and provide an alternative rate which equitably balances the revenue requirements of the cable operator with the public interest goals of the leased access statute. Our presumption is that the mean value of the net revenue of the marginal networks, including those currently earning no license fee, provides the most reasonable approximation of the revenue which is forgone when a cable operator carries leased access programming.

f. Effective Date of New Rate Regulations

50. We recognize that the industry should receive an appropriate amount of time to review and to take steps to comply with the new rate regulations set forth above. As a result, they will not become effective until 90 days after publication in the *Federal Register*.

iv. Expedited Process

51. As explained below, we do not change the current pleading cycle for leased access complaints set forth in Section 76.975 of the Commission's Rules, which requires the complaint to be filed with the Commission within 60 days of any alleged violation and the cable operator to submit a response within 30 days from the date of the complaint.¹³⁹ The Media Bureau will resolve all leased access complaints within 90 days of the close of the pleading cycle, obtaining additional discovery from the parties as necessary to quickly resolve complaints. Finally, we eliminate the requirement that a complainant alleging that a leased access rate is unreasonable must first receive a determination of the cable operator's maximum permitted rate from an independent accountant.¹⁴⁰

52. *Background.* Leased access programmers argue that the current complaint process prevents leased access from becoming a genuine outlet for programmers as Congress intended.¹⁴¹ They argue that leased access complaints can take years to resolve even when they present no new issues of law.¹⁴² They argue further that Commission staff has demonstrated a lack of interest in enforcing existing leased access rules.¹⁴³ MAP urges the Commission to adopt a "shot clock" whereby the Commission must act within 90 days or the complaint will be deemed granted.¹⁴⁴ Leased access programmers also urge the Commission to eliminate the independent accountant requirement for resolving leased access rate disputes.¹⁴⁵ They argue that the requirement is costly and results in delays in resolving leased access rate disputes.¹⁴⁶

53. Cable operators argue that the current complaint process is working as intended by encouraging negotiation over litigation.¹⁴⁷ Cable operators claim that very few leased access complaints

¹³⁹ See Appendix B (adopting 47 C.F.R. §§ 76.975(d), (g)).

¹⁴⁰ 47 C.F.R. § 76.975(b).

¹⁴¹ See MAP Comments at 4; see also CBA Comments at 4; PBC Comments at 2; LAPA Reply Comments at 4; PBC Reply Comments at 1.

¹⁴² See CBA Comments at 4; MAP Comments at 3; Engle Reply Comments at 2.

¹⁴³ See MAP Comments at 3; PBC Reply Comments at 1.

¹⁴⁴ See MAP Comments at 17-18.

¹⁴⁵ See CaribeVH Comments at 11; PBC Comments at 3.

¹⁴⁶ See CaribeVH Comments at 11; PBC Comments at 3.

¹⁴⁷ See TWC Comments at 22-23; Comcast Reply Comments at 20; NCTA Reply Comments at 9; Verizon Reply Comments at 9-10.

have been filed with the Commission and that the number of complaints has decreased in recent years.¹⁴⁸ TWC argues that the decrease in leased access disputes is also attributable to a well-understood body of precedent that provides clear guidance regarding the leased access rules.¹⁴⁹ TWC asks the Commission to revise the pleading cycle for leased access complaints by reducing from 30 days to 20 days the time in which a cable operator must respond to a leased access complaint, but to calculate the deadline from the date the Media Bureau issues a public notice announcing the complaint has been filed rather than from the date the complaint was filed.¹⁵⁰ TWC argues that such a change will serve the public interest by: (i) allowing other parties to participate in the complaint process; (ii) integrating the leased access pleading cycle with the generally applicable complaint pleading cycle in Section 76.7; and (iii) avoiding the need for cable operators to respond to informal correspondence filed by leased access programmers with the Commission that may not warrant treatment as a complaint.¹⁵¹ Cable operators also urge the Commission to retain the independent accountant requirement for resolving leased access rate disputes, arguing that it provides a low cost, streamlined process for obtaining an independent review of rate calculations that protects the highly confidential proprietary data used in calculating these rates.¹⁵²

54. *Discussion.* We retain our existing pleading cycle for resolution of leased access complaints set forth in Section 76.975 of the Commission's Rules, which requires the complaint to be filed with the Commission within 60 days of any alleged violation¹⁵³ and the cable operator to submit a response within 30 days from the date of the complaint.¹⁵⁴ We find that our current pleading cycle is not too lengthy, as it is imperative that we receive all the necessary information to resolve the dispute. Although we retain the existing time limits on filing of complaints, we add an exception that the time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator.¹⁵⁵ The cable operator must agree to the extension.

55. The Media Bureau will resolve all leased access complaints within 90 days of the close of the pleading cycle, obtaining additional discovery from the parties as necessary to quickly resolve complaints.¹⁵⁶ We believe that this expedited process will help to resolve leased access disputes quickly and efficiently and create a body of precedent to encourage private negotiations and the settlement of disputes. If the Media Bureau concludes that the complainant is entitled to access a leased access channel, the Media Bureau's resolution of the complaint will include a launch date for the programming.

56. *Elimination of Independent Accountant Requirement.* We eliminate the requirement for a complainant alleging that a leased access rate is unreasonable to first obtain a determination of the cable

¹⁴⁸ See Comcast Comments at 15, 35; Comcast Reply Comments at 20.

¹⁴⁹ See TWC Comments at 22-23.

¹⁵⁰ See TWC Comments at 25.

¹⁵¹ See TWC Comments at 25.

¹⁵² See Comcast Reply Comments at 21; NCTA Reply Comments at 10.

¹⁵³ See Appendix B (adopting 47 C.F.R. § 76.975(d)).

¹⁵⁴ See Appendix B (adopting 47 C.F.R. § 76.975(g)).

¹⁵⁵ See Appendix B (adopting 47 C.F.R. § 76.975(d)).

¹⁵⁶ See Appendix B (adopting 47 C.F.R. § 76.975(h)). As part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer proposals for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy. See Appendix B (adopting 47 C.F.R. § 76.975(h)(4)).

operator's maximum permitted rate from an independent accountant prior to filing a petition for relief with the Commission.¹⁵⁷ While the Commission adopted the independent accountant requirement as a means to "streamline" the leased access complaint process,¹⁵⁸ the record reflects that this requirement has not worked as intended. CaribeVH notes that it took seven months for it to resolve a leased access rate dispute at a cost of over \$50,000 for the accountant and thousands of dollars more in legal fees.¹⁵⁹ Similarly, PBC argues that the process of securing accountants is not financially feasible for most leased access programmers.¹⁶⁰ We conclude that the expense, delay, and uncertainty for leased access programmers resulting from the requirement to obtain a determination from an independent accountant are not what the Commission envisioned in attempting to "streamline" the leased access complaint process.¹⁶¹ Furthermore, we believe the new rate methodology we have adopted, along with the requirement to provide rate information and an explanation of how rates were calculated, will result in a simpler and transparent process for leased access rates. We also believe the expedited complaint process and expanded discovery we adopt herein provide leased access programmers with a more efficient process for challenging the commercial leased access rates charged by cable operators. While cable operators argue that the use of an independent accountant is important to protect commercially sensitive financial information, the Protective Order we adopt below will sufficiently safeguard such information.

v. Discovery

57. As discussed below, we adopt expanded discovery rules for leased access complaints to improve the quality and efficiency of the Commission's resolution of these complaints. We amend our discovery rules pertaining to leased access complaints to require respondents to attach to their answers copies of any documents that they rely on in their defense;¹⁶² find that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute,¹⁶³ subject to the protection of confidential material.¹⁶⁴ We emphasize that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with reasonable discovery requests.¹⁶⁵ The respondent shall have the opportunity to object to any request for documents.¹⁶⁶ Such request shall be heard, and determination made, by the Commission.¹⁶⁷ The respondent need not produce the disputed discovery material until the Commission has ruled on the discovery request.¹⁶⁸ Any party who fails to timely provide discovery requested by the opposing party to

¹⁵⁷ 47 C.F.R. § 76.975(b).

¹⁵⁸ See *Second Report and Order*, 12 FCC Rcd at 5319, ¶ 103.

¹⁵⁹ See CaribeVH Comments at 11.

¹⁶⁰ See PBC Comments at 3; see also CaribeVision Comments at 11 ("Unfortunately, most leased access programmers lack the money and time to engage in this process and are therefore left at the mercy of the cable operator.").

¹⁶¹ See *Second Report and Order*, 12 FCC Rcd at 5319, ¶ 103.

¹⁶² See Appendix B (adopting 47 C.F.R. § 76.975(g)).

¹⁶³ See Appendix B (adopting 47 C.F.R. § 76.975(e)).

¹⁶⁴ See Appendix B (adopting 47 C.F.R. § 76.975(f)).

¹⁶⁵ See Appendix B (adopting 47 C.F.R. § 76.975(e)).

¹⁶⁶ See Appendix B (adopting 47 C.F.R. § 76.975(e)).

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

which it has not raised an objection may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.¹⁶⁹

58. The Commission's procedures for resolving leased access complaints, including discovery, have tracked closely the procedures for resolving program access complaints. The Commission recently made significant amendments to the program access discovery procedures and we find that there is good cause to make similar amendments to our leased access procedures because they will have the same beneficial effects in this context and will further the statutory directive that the Commission "establish procedures for the expedited resolution of disputes concerning rates or carriage."¹⁷⁰ As a result of our action herein, the discovery process for leased access and program access complaints will be consistent.

59. Cable operators argue that the existing complaint process is working as intended and that no changes to the process, including the discovery rules, are required.¹⁷¹ Leased access programmers, however, argue that they should be afforded the right to seek discovery on how a cable operator has calculated its leased access rates.¹⁷² Under the current rules, a leased access complainant is entitled, either as part of its complaint or through a motion filed after the respondent's answer is submitted, to request that Commission staff order discovery of any evidence necessary to prove its case.¹⁷³ Respondents are also free to request discovery. We believe that expanded discovery will improve the quality and efficiency of the Commission's resolution of leased access complaints. Accordingly, we find that it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission,¹⁷⁴ provided that such documents are in its control and relevant to the dispute. In reaching this finding, we agree that evidence detailing how the cable operator calculated its leased access rate, as well as the availability of certain contracts for carriage of leased access programming, subject to confidential treatment, are essential for determining whether the cable operator has violated the Commission's leased access rules. The Commission's Rules allow the Commission staff to order production of any documents necessary to the resolution of a leased access complaint.¹⁷⁵ The subject discovery may require the production of confidential material, including evidence detailing how the cable operator calculated its leased access rate as well as carriage contracts, subject to our confidentiality rules. While we retain this process for the Commission to order the production of documents and other discovery, we will also allow parties to a leased access complaint to serve requests for discovery directly on opposing parties.¹⁷⁶

60. Parties to a leased access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. As discussed above, the respondent shall

¹⁶⁹ See *id.*

¹⁷⁰ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Report and Order*, 22 FCC Rcd 17791, 17851-56, ¶¶ 95-100 (2007) ("Program Access Order"); see also 47 U.S.C. § 532(c)(4)(A)(iii).

¹⁷¹ See TWC Comments at 22-23; Comcast Reply Comments at 20; NCTA Reply Comments at 9; Verizon Reply Comments at 9-10.

¹⁷² See MAP Comments at 17.

¹⁷³ See 47 C.F.R. §§ 76.7(e), (f).

¹⁷⁴ Indeed, in such circumstances, failure to produce the subject documents would also be a violation of a Commission Order.

¹⁷⁵ See 47 C.F.R. §§ 76.7(e), (f).

¹⁷⁶ See Appendix B (adopting 47 C.F.R. § 76.975(e)).

have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

61. We reiterate that respondents to leased access complaints must produce in a timely manner the contracts and other documentation that are necessary to resolve the complaint, subject to confidential treatment.¹⁷⁷ In order to prevent abuse, the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly or do not respond in a timely manner to permissible discovery requests with the necessary documentation attached.¹⁷⁸ Respondents that do not respond in a timely manner to all discovery ordered by the Commission will risk penalties, including having the complaint against them granted by default.¹⁷⁹ Likewise, a complainant that fails to respond promptly to a Commission order regarding discovery will risk having its complaint dismissed with prejudice.¹⁸⁰ Finally, a party that fails to respond promptly to a request for discovery to which it has not raised a proper objection will be subject to these sanctions as well.¹⁸¹

62. We understand that this approach requires the submission of confidential and extremely competitively-sensitive information.¹⁸² Accordingly, in order to appropriately safeguard this confidential information we believe it is necessary to utilize the protective order adopted for use in our program access proceedings ("Protective Order"), which we attach hereto as Appendix C.¹⁸³ The Protective Order sets out the methodology for producing and protecting pleading or discovery material that is deemed by the submitting party to contain confidential information.¹⁸⁴ The Protective Order states that, once the authorized representative of the reviewing party has signed the appropriate declaration, the submitting party *shall* provide a copy of the confidential information to authorized representatives upon request. Authorized representatives of reviewing parties are limited to counsel and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional

¹⁷⁷ See 47 C.F.R. § 76.9.

¹⁷⁸ See Appendix B (adopting 47 C.F.R. § 76.975(e)).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See, e.g., 47 C.F.R. § 0.457(d)(iv) (treating as presumptively privileged and confidential "programming contracts between programmers and multichannel video programming distributors"). In this regard, we note that in a recent program access dispute, the Media Bureau expeditiously granted a complainant's request for discovery and issued a protective order to safeguard the highly confidential discovery subject matter. See *EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, CSR 7070-P (filed Nov. 15, 2006).

¹⁸³ See Appendix B (adopting 47 C.F.R. § 76.975(f)); see also Appendix C; *Program Access Order*, 22 FCC Rcd at 17894-99, Appendix E.

¹⁸⁴ Confidential information is information submitted to the Commission which the submitting party has determined in good faith: (i) constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (ii) falls within the terms of Commission Orders designating the items for treatment as confidential information. See *Program Access Order*, 22 FCC Rcd at 17856, ¶ 100 n.463. The Commission may determine that all or part of the information claimed as confidential information is not entitled to such treatment. See 47 C.F.R. § 76.9 (general procedures for protecting confidentiality of information).